

Contract Exemption 2018-02

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The West Virginia Ethics Commission

Opinion Sought

The **West Virginia Tourism Office** requests a Contract Exemption to sell advertising space and membership in West Virginia's Cooperative Advertising Program to The Greenbrier.

Facts Relied Upon by the Commission

The West Virginia Tourism Office ("Tourism Office" or "Office") is statutorily charged with "develop[ing] and implement[ing] a comprehensive tourism advertising, promotion and development strategy for West Virginia." W. Va. Code § 5B-2I-4. The executive director of the Office is specifically directed to administer a "cooperative advertising program ["CAP"] to facilitate and allow participation in the West Virginia Tourism Office's advertising and marketing campaigns and activities" W. Va. Code § 5B-2I-4(a)(4).

The Tourism Office states that its mission is to promote a "world-class tourism destination that provides jobs, stimulates investment, grows existing businesses, and promotes a positive image of West Virginia as a place to visit, go to college, live, work, and retire."

The Office's cooperative advertising program allows private businesses and other participants to buy into the state's centralized advertising campaign.¹ The program creates a unified advertising campaign. The state has committed \$1.8 million to this program. *Id.* The program provides a "dollar-for-dollar" match to its participants, and it offers a variety of investment tiers that range in cost from \$250 to \$50,000. *Id.* Each tier package provides greater marketing exposure for participants. For example, the \$50,000 package includes featuring a participant on the Tourism Office's website homepage and a 15-30 second video clip on the program's social media. *Id.* The Greenbrier is expected to purchase the highest tier and therefore contribute \$50,000 to West Virginia's overall advertising campaign.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(d)(1) states, in relevant part:

[N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract

¹ <https://gotowv.com/wp-content/uploads/2017/10/govcon-handout-41.pdf>

which the official or employee may have direct authority to enter into, or over which he or she may have control

W. Va. Code § 6B-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

W. Va. Code R. § 158-8-4 states, in relevant part:

Public officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

Advisory Opinion

The Ethics Act prohibits a public official or member of the official's immediate family or business with which the official is associated from being a party to or having an interest in the profits or benefits of a public contract over which the official has direct authority or control unless the governing body seeks, and receives, an exemption to contract with the public official. W. Va. Code § 6B-2-5(d).

The Greenbrier would buy into the advertising program and therefore be a party to a contract with the Tourism Office. The Greenbrier constitutes a business with which the Governor of West Virginia is associated for purposes of W. Va. Code § 6B-2-5(d) due to the Governor owning more than five percent of The Greenbrier's total outstanding stock. W. Va. Code R. § 158-8-4. The Governor has a financial interest in The Greenbrier's contracts. A financial interest in a public contract alone, however, is not enough to trigger the prohibition in W. Va. Code § 6B-2-5(d)(1).

A public official must also have either direct authority or control over the public contract in which the official has a financial interest. In this case, the Governor is the chief executive officer of the State of West Virginia and directly appoints the executive director of the Tourism Office, who serves at the will and pleasure of the Governor. W. Va. Const. Art. 7 § 5; W. Va. Code § 5B-2I-3(b). The salary of the executive director is set by the Governor. *Id.* Furthermore, the Cabinet Secretary of the Department of Commerce, the Department under which the Tourism Office is organized, is appointed by and serves at the will and pleasure of the Governor. W. Va. Code § 5B-1-1(a). The Commission accordingly finds that the Governor has sufficient control over the public contracts of the Office with The Greenbrier for purposes of W. Va. Code § 6B-2-5(d)(1).

Therefore, W. Va. Code § 6B-2-5(d)(1) prohibits the Tourism Office from selling advertising in the state's cooperative advertising program to The Greenbrier unless it receives a Contract Exemption.

Excessive Cost, Undue Hardship or Other Substantial Interference

The Commission may grant an affected governmental body an exemption from the prohibition in W. Va. Code § 6B-2-5(d)(1) when it would result in excessive cost, undue hardship or other substantial interference with the operation of the governmental body. W. Va. Code § 6B-2-5(d)(4).

The Tourism Office states, "The Greenbrier is critical to the CAP's success because it is one of West Virginia's strongest and best-funded tourism assets." The Tourism Office additionally states that The Greenbrier is one of the state's premier destinations "with the highest likelihood to attract a higher-spending demographic." The Office cites several recent studies that indicate that a higher spending demographic is key to the state's advertising campaign.

The Office states that it needs the matching dollars from The Greenbrier to make larger advertising buys and better compete with neighboring states for tourism. Further the Tourism Office states that it needs to include The Greenbrier in its advertising to avoid excessive cost to the Office, which already has an "overburdened budget."

The Commission defers to the Tourism Office's determination that including The Greenbrier in its advertising cooperative is key to promoting West Virginia and achieving its mission. See Advisory Opinion 95-28 ("The determination of whether [an] activity will actually benefit the state by promoting tourism and economic development is an issue for the [agency] to resolve.").

The Ethics Commission finds that denial of the Contract Exemption would result in undue hardship and excessive cost to the West Virginia Tourism Office, and hereby grants the Tourism Office a Contract Exemption to allow it to include The Greenbrier in West Virginia's Cooperative Advertising Program.

The Ethics Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this Contract Exemption is limited to the facts and circumstances of this particular case, and may not be relied upon as precedent by other persons or entities.



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission